

SUBJECT: Amending constitution to allow bail denial in some circumstances

COMMITTEE: Constitutional Rights and Remedies, Select — favorable, without amendment

VOTE: 10 ayes — Ashby, Clardy, Geren, Jetton, Klick, Landgraf, Longoria, Lozano, Shaheen, White

0 nays

5 absent — S. Thompson, Bucy, A. Johnson, Moody, Neave

SENATE VOTE: On final passage, August 9 — 27-2 (Blanco, Eckhardt)

WITNESSES: No public hearing.

BACKGROUND: Texas Constitution Art. 1, sec. 11 and Code of Criminal Procedure (CCP) art. 1.07 state that all prisoners shall be bailable unless accused of a capital offense when proof is evident.

Other provisions in the Texas Constitution allow judges and magistrates to deny bail in certain situations. District judges have discretion, under Texas Constitution Art. 1, sec. 11a, to deny bail if a defendant is accused of:

- a felony and has been convicted of two prior felonies;
- a felony committed while on bail for a prior indicted felony;
- a felony involving a deadly weapon after a conviction for a previous felony; or
- a violent or sexual offense committed while on probation or parole for a previous felony.

Under Texas Constitution Art. 1, sec. 11b, judges or magistrates may deny bail to those accused of an offense involving family violence if the accused had been released on bail on those charges and the bond was revoked or forfeited because the accused violated a condition of the bond

related to the safety of the victim or community.

Texas Constitution Art. 1, sec. 11c allows bail to be denied if a judge or magistrate determines at a hearing that the arrestee violated certain protective orders. Bail may be denied if a person:

- violates an emergency protective order issued after an arrest for family violence;
- violates an active protective order issued by a court in a family violence case, including a temporary ex parte order served on the person; or
- engages in conduct that constitutes an offense of violating any of these court orders.

Sec. 11a defines "violent offense" as murder; aggravated assault, if the accused used or exhibited a deadly weapon during the commission of the assault; aggravated kidnapping; or aggravated robbery. "Sexual offense" is defined as aggravated sexual assault, sexual assault, or indecency with a child.

DIGEST:

SJR 3 would amend the Texas Constitution to expand the conditions under which judges and magistrates were authorized to deny bail and would establish procedures for when bail was denied in these cases. It also would establish requirements for setting conditions of bail.

Denial of bail. Individuals accused of committing a sex offense punishable as a first-degree felony, a violent offense, or continuous human trafficking could be denied bail pending trial if a judge or magistrate determined by clear and convincing evidence after a hearing that requiring bail and conditions of release were insufficient to reasonably ensure the person's appearance in court or the safety of the community, law enforcement, or the victim of the alleged offense.

A judge or magistrate who denied a person bail under these provisions would be required to prepare a written order that included findings of fact and a statement explaining the reason for the denial.

These provisions could not be construed to:

- limit any right a person had under other law to contest a denial of bail or to contest the amount of bail set by a judge or magistrate; or
- require any testimonial evidence before a judge or magistrate made a bail decision under these provisions.

In determining whether clear and convincing evidence existed to deny a person bail under these provisions, judges and magistrates would have to consider the factors they are required to consider when setting bail under general law, including statutory law governing criminal procedure.

"Violent offense" and "sexual offense" would have the meanings established under Texas Constitution Art. 1, sec. 11a.

Conditions of bail. SJR 3 would require that when setting bail, judges or magistrates impose the least restrictive conditions, if any, and the monetary bond or personal bond necessary to reasonably ensure the accused person's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense.

Proposition. The proposed constitutional amendment would be submitted to voters at an election on May 7, 2022. The ballot proposal would read: "The constitutional amendment requiring a judge or magistrate to impose the least restrictive conditions of bail that may be necessary and authorizing the denial of bail under some circumstances to a person accused of a violent or sexual offense or of continuous trafficking of persons."

SUPPORTERS
SAY:

SJR 3 would make Texas safer and ensure a fair bail system by expanding the circumstances under which judges and magistrates could deny bail, requiring certain procedures when bail was denied, and requiring that all bail decisions focus on an accused person's appearance in court and on the safety of the community, law enforcement, and victims of an alleged offense.

Currently, bail may be denied and defendants detained pre-trial only in very limited circumstances. Bail decisions under the current system have resulted in high-risk and dangerous defendants with financial means being released before trial. The current system resulted in tragedies such as the 2017 killing of Department of Public Safety trooper Damon Allen, who was shot during a traffic stop by someone who had been released on bail despite being a repeat offender with a violent past.

SJR 3 would address these concerns by allowing bail to be denied in cases of violent offenses, serious sex offenses, and offenses for continuous human trafficking. Under current law, judges sometimes feel strongly that someone accused of these serious crimes is dangerous and should be kept in detention pretrial, but these judges have limited tools to address the situation. While judges might attempt to keep those accused of these crimes in jail by setting high bail, defendants with resources still can obtain release. The offenses listed in SJR 3 are serious enough that, if warranted by individual circumstances, judges should be able to take actions to keep the public safe and ensure a defendant will return to court.

SJR 3 would give judges and magistrates a tool to use when they deemed it necessary and would establish a fair process to ensure it was used only when appropriate and that the rights of the accused were protected. Current tools have proved ineffective in protecting the community, in some cases with tragic consequences when defendants released on bail have committed serious crimes that harm others. To ensure all relevant issues were considered and bail was denied only in appropriate cases, SJR 3 would require a hearing before bail could be denied and that judges and magistrates make certain findings find by clear and convincing evidence. These provisions would safeguard against denial of bail being routine or being used without the careful consideration of individual cases.

SJR 3 would ensure that that those accused of low-level, nonviolent offenses did not receive excessive bail and that when bail was granted, conditions were appropriate. The proposition would do this by requiring that judges and magistrates impose the least restrictive conditions and that monetary and personal bonds be set to reasonably ensure the accused

person's appearance in court and ensure the safety of the community, law enforcement, and the victim of the alleged offense. These provisions would ensure that jails housed only those who should be there pretrial.

It is an appropriate use of criminal justice resources to keep the most dangerous defendants accused of the most serious offenses in jail pretrial when warranted. SJR 3 would balance the use of resources with the provision that when bail is set, judges and magistrates should impose the least restrictive conditions and bail necessary.

The Texas Constitution long has recognized that there are exceptions to the requirement that bail generally should be made available to criminal defendants. SJR 3 would be in line with current constitutional provisions by allowing bail denial in justifiable circumstances for those accused of the most heinous crimes.

SJR 3 would work with other legislation on bail being considered by the Legislature to result in better qualified magistrates with more tools making informed, fair bail decisions.

**CRITICS
SAY:**

SJR 3 would be too broad an expansion of the circumstances under which bail could be denied and would erode the tenet that granting bail is presumed and should not be denied except in the most limited cases. Pretrial detention should be a rare exception, not something available for multiple crimes that could be first-time offenses. While current law allows pretrial detention in some cases, the law generally is focused on cases in which defendants were repeat offenders with multiple felonies or there were other extraordinary circumstances. Defendants are presumed innocent, and detaining them pretrial inverts that presumption.

Those accused of offenses covered by the resolution could be confined for years, regardless of the strength of the evidence in the case, waiting for a trial that could result in a term of less time than they waited for trial. Allowing bail denial for a broad group of offenses could have a disparate impact on communities that have been disenfranchised historically or overly impacted by the criminal justice system.

Judges and magistrates have tools under current law to use before a trial to monitor defendants accused of serious crimes. These tools include electronic monitoring, house arrest, curfews, drug and alcohol testing, and other restrictive conditions that can be required with release on bail.

SJR 3 could result in bail denials becoming routine, rather than the exception, for those accused of certain crimes. This could increase populations in county jails, straining their resources.

OTHER
CRITICS
SAY:

To prevent defendants from being kept in jail pretrial when evidence against them was weak, SJR 3 should include a requirement that before bail could be denied, magistrates make a finding about the strength of the evidence indicating an individual's guilt.

NOTES:

SB 6 by Huffman (Smith), the enabling legislation for SJR 3, is on today's General State Calendar.

According to the Legislative Budget Board, the cost to the state for publication of the resolution would be \$178,333.